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### Contact Committee on the Return Directive, 26<sup>th</sup> November 2010 Statement by *Philip Amaral*, policy and communications officer, JRS-Europe

#### Introduction

On behalf of JRS-Europe I would like to thank DG Home Affairs for the invitation to speak at this meeting.

It is of vital importance for civil society to be given an opportunity to intervene on matters such as these. In transposing the Return Directive into national law, it is important to not only be cognisant of the needs and aims of member states, but especially the needs, rights and dignity of irregular migrants – for it is they who will experience the consequences of transposition in a very personal way.

I have been asked to open the discussion of today's meeting by commenting on the question of whether alternatives to detention can be a “win-win scenario” for states and migrants. As regards the Return Directive, which has attracted so much negative attention because of its legal provisions on detention, I think that it is a positive step that we are here today to discuss how to create policy that avoids detention while meeting the needs of all stakeholders.

#### The policy of detention

Before we can consider the question of whether alternatives would be a “win-win scenario” for states and migrants, it would be important to briefly reflect on how detention performs as a policy. In other words, does detention reflect the elements that are necessary for good policy?

In terms of precision and clarity, the Return Directive provides for detention guidelines that are clearer and more precise than existed before in EU law. But until we see how the Directive will be transposed into national law, detention will continue to be used more as a blunt tool rather than a sharp instrument. In the context of irregular migration, detention is applied nearly automatically. This begs the question: do member states know, clearly and precisely, whom they are detaining? And are states' assumptions about who to detain accurate?

Automatic detention negates individual differences and factors that are crucial for a) a migrant's fundamental rights, and b) the state's ability to enforce removal. Automatic detention without a qualified and individualised assessment of each person means that needs and vulnerabilities go unnoticed or mistreated; and states remain unaware if return is actually a real possibility or not. It also means that certain groups of detainees, such as 'single young men', are always detained without a clear assessment of their flight risk. The consequence is that migrants are personally harmed in detention, and more and more “non-returnable” cases appear – all to the negative cost of the state. Against this background, precision and clarity in detention policy seems lacking.

In terms of evidence, do we know that detention actually deters against irregular migration? Does it effectively carry out a state's return policy? If the answer to the first question would be 'yes', then irregular immigration in Europe might be much less of a phenomenon than it currently is. Rather than

being a deterrent, detention amounts to improper purpose: it is not tailored to individual cases, it is often unnecessary and disproportionate, and it amounts to collective punishment of irregular migrants. What we *do* know about detention, from the evidence, is that it hurts the individual, it is costly, and it negatively impacts integration should a detainee be released and settled into the community. In answering the second question, evidence does not suggest that frequent use of detention is necessary to effect return. Contrary, evidence does suggest that there are other sufficient but less coercive measures that can be effectively applied in place of detention.

How does detention serve the needs of practicality and legitimacy, as a policy? It would appear to be practical to hold irregular migrants in one location until they are returned. But for detention to be legitimate, then it must only be used when return procedures are in place and the actual return imminent. Instead, we see that irregular migrants are detained for long periods, often with no real prospect of removal. Moreover, the implementation of detention comes at the financial cost of the state: the construction, maintenance and staffing of detention centres is expensive, as well as the caring for a dependent population. But there are political costs as well: namely the detainment of large groups of non-criminals for no clearly definable purpose.

Finally, it is important to look at both the extent to which detention relies on coercion, and its level of proportionality. Successful policies require the open participation of all relevant stakeholders. Detention within the context of return procedures, of course, relies very much on coercion. Detainees are given little to no opportunity to freely intervene in return procedures. We observe that people are usually willing to abide by the law as long as they are given a fair chance to intervene. The reliance on coercion results in more costs to the state, since they are forced to enact a return policy on people who are unwilling and disempowered, and it disrupts any trust between the migrant and the state. From this we can see that coercion is applied disproportionately to the actual circumstances of the migrant's situation, since there is no individualised assessment. If an individual is assessed neither to be a flight risk nor a danger to security, then the reasons for detention drastically diminish.

### **Moving on to alternatives to detention**

Oppositional arguments to detention rely heavily on grounds of morality, ethicality and human rights. These arguments are entirely legitimate and persuasive, but there is another side to it: can we not envision a policy alternative that is more precise, clear, evidence-based, legitimate, and proportional? Can we not envision a migration policy that does not rely on the use of detention, but instead relies on a practical and non-coercive approach that would satisfy the needs of both migrants and states?

JRS-Europe would argue that it is very achievable for member states to undertake a migration and return policy, one that envisages all possible outcomes, without resorting to detention in the first instance.

In fact, alternatives to detention already exist: in the criminal justice system, for example. Prisoners are released early on grounds of good behaviour, or to serve out the rest of their sentence in the community. Persons at pre-trial hearings might be released into the community on personal recognizance, or on bail, instead of being jailed.

The point here is that alternatives to detention probably already exist within national legislation. The question to ask is: can such examples serve as a basis for establishing alternatives for immigration detention? What can states learn by looking into their own experiences with alternatives in different contexts?

What are the factors that would make alternatives work for states and migrants? If we were to look at examples of alternatives, could we identify a common factor, or set of factors, that contribute to their success?

One such factor is the implementation of an individualised need and risk assessment procedure. This is used to learn as much as possible about the migrant, their needs, vulnerabilities and the risks they may pose to the state, *before* a decision to detain is made. What would a need and risk assessment entail?

- A legal requirement: to identify grounds for release into the community in the first instance
- Governments checks: to verify identity and to conduct a health and security screening
- Individual case factors: the person's stage in the visa determination process, anticipated time until case resolution, local family and community connections, the person's 'belief' in the process and their compliance to date.
- Vulnerability check: special needs related to key areas of vulnerability that may place people at heightened risk in a detention environment
  - Age: the elderly, children, unaccompanied and separated minors
  - Gender and diversity: women at risk, pregnant and nursing mothers, sexual diversity and gender identity
  - Health: physical and mental health, disability, psychosocial needs
  - Protection needs: including refugees, asylum seekers, stateless persons, trafficked persons, survivors of torture and trauma, sexual and gender based violence or other violence/persecution

Using a need and risk assessment procedure can save valuable time and resources for migrants and states alike. For migrants, it can be used to express early on any special needs and vulnerabilities they may have, or ties to the community, such as family. For states, it can provide a view as to the likelihood that a person might abscond or not, or be able to comply with migration and return procedures.

Another factor that is common to successful alternatives is the provision of case management. Why are caseworkers important?

- They can provide dedicated holistic support to migrants. They can serve as the human face of migration and return policy in their accessibility to migrants, building trust and rapport.
- Caseworkers can counsel migrants on all of the possible outcomes they might experience, whether it is settlement in the country, or return to the country of origin. From our experience in meeting with people who are part of the Belgian alternative, we know that people are inclined to comply with a decision if they have had an opportunity to explore all possible outcomes, in a manner that is non-coercive, transparent and clear. It is important to provide migrants with a level of choice: it builds compliance and trust.
- They can provide migrants with access to sources of support, such as legal aid, or spiritual support, or medical and psychosocial care.
- They can identify and understand the barriers to compliance. The close rapport that a caseworker can build with a migrant means that they can learn about obstacles that would hinder voluntary return, or about new information that would enable a migrant to stay within the country – and even about factors that might lead to non-compliance with migration and return procedures.

An important factor in successful alternatives: implementation as early in the process as possible. Indeed, alternatives in Belgium and Sweden, and even Australia and the US show that intervention at the beginning can lead to clearer expectations between state authorities and migrants, as well as to clearer outcomes that are perceived more legitimately, and are better accepted, by all stakeholders.

It is very important that a need and risk assessment process, as well as a case management support, take place before a decision to detain is made, and at the earliest stage of a person's immigration case – it is a crucial factor of compliance and trust. And trust, between migrants and the state, and migrants'

trust in the migration procedures, is absolutely necessary for such a policy to work smoothly, efficiently and effectively.

## **Conclusion**

If I was a member state representative, two questions might come to my mind after having listened to these remarks.

*Firstly: could we afford to refrain from the status quo and undertake a policy shift towards alternatives to detention?*

It is understood that legal standards do allow for the use of detention pending removal, for the prevention of absconding or for compliance with an expulsion order. But it is also understood that detention in this context is only legitimate if prescribed by law, used only as a last resort when all other non-coercive measures have been exhausted, and when it is necessarily linked to a specific procedure, such as to effect removal. It must be proportional and reasonable.

Yet at what cost does the use of detention bring? There is widespread agreement, as there is evidence, that detention is a very negative policy measure. In terms of human impact, upon migrants themselves, the cost is exorbitant. And they are not the only ones who bear this cost. The environment of a detention centre is filled with stress and tension, for detainees as well as for guards, staff persons and administrators alike. It is an environment where successful outcomes are far too few.

A migration and return policy cannot thrive within such an environment where the target group – irregular migrants – is disempowered and the implementing group – staff and state authorities – must struggle to implement a policy that is based on force rather than choice. For states, the costs in misused human resources and ineffective policies are also exorbitant. Politically speaking, there is already little appetite for the detention of certain groups of people: children, women at risk, families, torture victims and the medically ill. As more research is done on the effects of detention in the coming years, we may find that there would be even less political appetite for the use of detention in general.

The costs that are associated with the status quo are ever more difficult to sustain, in political as well as economic terms: the maintenance of large detention premises, the funding of 24/hour security staff, the security technology itself and caring for a dependent population. To provide for an alternative policy that relies less on coercion and security, and more on building trust; assessing needs as well as risks; providing migrants with a full range of information on all possible outcomes, is a policy that would bear much less of a human, economic and political cost to the state.

*Secondly: could we not implement a needs and risk assessment approach, coupled with individualised case management, in a detention centre?*

From our own research we've learned that the environment of a detention is not conducive to a policy that relies on transparency, non-coercion, trust and compliance. The amount of stress placed upon the individual impedes his or her ability to fully participate in a case management approach, and on his or her ability to clearly reflect upon and prepare for any possible outcome: whether it be settlement in the country or return home.

Furthermore, as expressed by JRS staff who visit families participating in the Belgian alternative, the level of close accompaniment that is possible in an open and non-coercive environment is simply not possible in a detention centre. Individuals are too preoccupied, and too angry, at the state of their situation: the meaningful and trustworthy rapport that case management requires would have little chance of success in this scenario.

Migrants have little incentive to forthrightly participate in and voluntarily comply with a migration and return policy, especially if the outcome is negative, if they are not given a fair chance. And for states

there is too little to gain in such instances, when detention is used as a first resort rather than only when all other measures are exhausted.

A reliance on detention means that nobody 'wins' – whereas a reliance on alternatives to detention means that both states and migrants have a chance to reach an end that is more dignified and legitimate for both.